Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
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82-1174

No. ....

IN THE

Supreme Court of the United States

October Term, 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT; LOIS EWEN; HARRIET ALLEN; MILDRED BENIOFF; HANK DOERFLING; MARY HENDERSON; HELEN MCABOY; JUDY ROSENER; JOHN RUSH; NAOMI SCHWARTZ; LYNN SCHENK; and RICHARD GOLDEN, each individually and as members of the California Coastal Commission; MICHAEL FISCHER, individually and as Executive Director of the California Coastal Commission; CALIFORNIA COASTAL COMMISSION, an agency of the State of California; and THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented.

1. Where a state regulatory body "temporarily" and unlawfully prevents a property owner from putting his land to any lawful or reasonable use for years — all on the pretext that the delay was for the benefit of the public — does the "temporary" character of the taking insulate the state from liability for just compensation under the Fifth and Fourteenth Amendments?

2. *A fortiori*, where the state, through one of its counties, owns the fee interest in the land, and the property owner has only a sixty-year leasehold interest on which he must pay rent and taxes annually, so that the years of delay permanently and irretrievably deprive him of a part of the leasehold interest for which he is paying, has there been a *pro tanto* permanent taking of property entitling the property owner to just compensation?

3. Should the Court now address on the merits the issue of proper taking remedies, left open in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and again left open in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), and thereby resolve the nationwide disagreement now raging among state courts and among the circuits?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Interstate Marina Development Co., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

THE OPINION BELOW.

The Court of Appeals rendered its decision by Memorandum Opinion (unpublished), captioned *Interstate Marina Development Co.* v. *The State of California*, No. 81-5312.

JURISDICTION.

1. This is an action for just compensation in which Plaintiff-Petitioner contends that Defendants-Respondents (the State acting through its Coastal Commission, and certain officials thereof sued individually and in their official capacity) effected an uncompensated taking, and deprivation of Petitioner's property without due process of law.

2. The opinion below was filed on August 23, 1982. Petitioner's timely petition for rehearing was denied on October 12, 1982.

3. Jurisdiction of the U.S. District Court in which this action was brought was based on 28 U.S.C. §1331 and 28 U.S.C. §1343.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fifth Amendment, U.S. Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, U.S. Constitution:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983.

> "Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE.

Procedural Statement.

Petitioner seeks review of the affirmance of a District Court dismissal of its action against the California Coastal Commission and its members, seeking interim just compensation for a temporary taking of its entire leasehold, and a permanent *pro tanto* taking of the part of its 60-year leasehold that was irretrievably destroyed during the years of the regulatory taking.

STATEMENT OF FACTS.

Interstate Marina Development Co. (IMDC) is a limited partnership holding a 60-year lease on an approximately four-acre parcel in the Marina Del Rey area of Los Angeles County. The Marina Del Rey, a project of the County, has been intensively developed over the years and is well known as a complex of marinas and various water-oriented apartments, condominiums, hotels, restaurants, offices, and other businesses. It is, in short, a fully developed urban area, not some sort of environmentally fragile open land.

The land is owned in fee simple by the County of Los Angeles, a political subdivision of the State, and the IMDC lease requires that IMDC improve the subject property with hotels, apartments, restaurants and other facilities designed to maximize the return from the land. This return-empha-

sizing feature was inserted into the lease at the County's insistence. Under the lease, and throughout the events that gave rise to this action, *IMDC has been required to pay rent to the County, and has been taxed on its leasehold based on such contemplated intensive, income-producing uses, even though for years IMDC was prevented from putting the subject property to any economically rational use whatsoever.*

In 1972, California adopted by initiative the Coastal Zone Convervation Act which imposed a number of regulatory requirements on land uses in the Coastal Zone, which includes Marina del Rey. After completing necessary preliminary work, IMDC applied for a coastal development permit in 1976, but the Regional Coastal Commission denied the application. The State Coastal Commission refused to hear IMDC's appeal.

Thereupon IMDC brought parallel actions against the Commission in state and federal courts.[1] At first, the U.S. District Court abstained because another entity (Marina Plaza — of which more presently) was in the process of litigating potentially dispositive state law issues. After the state courts ruled adversely to Marina Plaza (see *Marina Plaza* v. *California Coastal Zone Conservation Commission*, 73 Cal.App.3d 311, 140 Cal.Rptr. 725 (1977)), the District Court resumed exercise of its jurisdiction. IMDC then moved for partial summary judgment. After first resisting, the Commission stipulated that IMDC's permit application be remanded for reconsideration. This was ordered on December 15, 1978. The following month, the Regional Commission granted the permit application, but this was appealed by opponents of IMDC's project to the State

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[1]The defendants are hereafter collectively referred to as "the Commission," unless otherwise indicated.

Coastal Commission[2] which — sharp contrast with its earlier attitude, when IMDC was appealing a permit denial — found that when the appeal was pursued by IMDC's adversaries, there was after all a substantial issue, and set the matter for hearing.[3]

In the meantime, Marina Plaza, another entity, was still pursuing its permit application (an effort that began in 1973) to build an entirely different project in the Marina del Rey area. But, acting on the pretext that one of IMDC's general partners was also a partner in Marina Plaza, the Commission — over vehement objections of both IMDC and Marina Plaza — consolidated the two matters and heard one appeal for both projects.

The Commission then ostensibly granted both permits, but cynically made them subject to onerous conditions that rendered both permits illusory as a practical matter. Marina Plaza had applied for a 9-story, 300-room hotel, but it was "permitted" to build a 3 to 4 story, 75 to 100 room motel. And, evidently to make sure that Marina Plaza's project would be economically unviable, the Commission also required that Marina Plaza include a youth hostel, a public promenade, provide public recreational vehicle hookups, and provide public bicycle racks. Then, to drive the last nail into Marina Plaza's economic coffin, the Commission decreed that Marina Plaza could charge no more than $20 per night per room, *and* that its restaurant charges be comparable to those of such large-scale, low-cost chain oper-

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[2]Under California's peculiar practice, virtually anybody can appear in Commission proceedings and appeal a Regional Commission determination, but the state Commission hears such appeals only if it first decides that there is a substantial issue.

[3]The attitude of the Commission toward private landowners, and the California state courts' unduly indulgent attitude toward the Commission, may be gleaned from Berger, *You Can't Win Them All — Or Can You?*, 54 Cal. State Bar Journal 16 (1979).

ations as Sambo's or Denny's (a level totally incompatible with any quality hotel operation).

The reason why this blatant mistreatment of Marina Plaza is pertinent, is that the Commission then conditioned IMDC's permit on the economically ridiculous Marina Plaza project being built first, and on the posting by IMDC of a "construction bond"[4] to ensure the completion of the *Marina Plaza project* in accordance with that permit.

It was the Commission's avowed intention, evident from its findings, to require IMDC to subsidize the youth-hostel and other low-cost, public service features they had imposed on the Marina Plaza project, in order to get permission to build its own project.

IMDC amended its complaint to allege the above events, and filed a parallel action in the state Superior Court to set aside the conditions. The state court entered judgment in IMDC's favor to the extent of issuing a writ of mandate, but denied any monetary relief under the complusion of *Agins* v. *Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P. 2d 25 (1979), aff'd. on other grounds, 447 U.S. 255 (1980).

Since then, the Commission has replaced most of the conditions objected to with ones that IMDC can live with. There is thus no further non-monetary relief that is appropriate. The only question left is whether IMDC is entitled to recover just compensation for this complete deprivation of its property for the years consumed while the Commission went through its various unlawful maneuvers. To that extent, Petitioner has suffered grievous losses and years of

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[4]Such a bond, which even in theory would be enormously expensive could not in reality be obtained at all because it would create liability in IMDC for the construction of Marina Plaza, and no bonding company in its right mind would underwrite such an uncontrollable liability of one entity for the acts or omissions of another.

delay, but has been left with no remedy, unless this Court grants relief.

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

The aftermath of this Court's decision in *Agins* v. *Tiburon*, 447 U.S. 255 (1980), and *San Diego G. & E. Co.* v. *City of San Diego*, 450 U.S. 621 (1981), in which the Court declined to deal with the issue of remedies for regulatory takings, has been a veritable maelstrom of litigation throughout the nation, with conflicting and utterly irreconcilable results, remedies and legal theories.

While the Constitution purports to protect private property against takings, it is a matter of common knowledge that zealous local officials, with an ear cocked to their influential (usually affluent suburbanite) environmentalist constituency, are using onerous regulations, complex regulatory procedures and, above all, delay, to acquire *de facto* various interests in the ostensibly "regulated" land. Until and unless this Court speaks out on this issue with clarity, such large-scale subversion of the constitutional protection is certain to go on. The belief that no damages are payable for abuse of private property rights is viewed — often quite cynically — by local officials (who would rather not have to spend public money) as a basis for taking a risk-free shot at stultifying private property rights and grinding down their owners with enormously costly delay, huge losses, and litigation expenses.

This case provides the Court with an opportunity to address a limited facet of the "taking issue:" *i.e.*, whether a temporary regulatory taking invokes the guarantee of the Taking Clause and requires payment of just compensation. This case provides the Court with an unusually clear and egregious example of how *de facto* confiscation can disguise itself as "regulation," and how ostensibly "temporary" interference with property rights, in the case of a lessee, *de*

facto deprives him totally and permanently of a significant portion of his leasehold for which he is forced to pay rent and taxes by the very government that denies him any use of it. This case offers the Court a unique opportunity to continue its case-by-case approach toward systematizing the law of takings so as to create a body of guiding precedent.

Beyond Petitioner's plight, it is doubtful whether there has ever been a serious issue of constitutional law that has so sharply divided the country's judiciary, and simultaneously left it so bereft of authoritative guidance from this court. Remedial intervention by this Court is urgently needed; it is a matter of serious national priority.

I.

THERE IS A VACUUM OF GUIDING PRINCIPLE IN THE LAW OF REGULATORY TAKINGS, THAT NEEDS THE COURT'S ATTENTION.

A. The Country Desperately Needs This Court's Guidance As to Where Flexibility Ends and Precedent Begins.

The avowedly *ad hoc*, case-by-case approach to issues of non-physical takings, favored by the Court thus far (see *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 123-24 (1978)) has with the passage of time led to situations where predictability has been sacrificed to flexibility to such an extent that neither private nor public parties across the Nation are able to ascertain what their rights are without first litigating through the highest appellate levels. Even then, the results are chaotic.[5]

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[5]This is the prevailing view among scholars of the first rank; see commentaries collected in *San Diego G. & E. Co.* v. *City of San Diego*, 450 U.S. 621, 649, fn. 15. To those commentaries there should also be added the scathing assessment of Prof. Arvo Van Alstyne, another leading scholar in this field, that "with some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning and empty rhetoric." *Van Alystyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 2 (1970).

The relatively infrequent decisions of the Court in this field, combined with the avowed *ad hoc* nature of judicial inquiries, merely provide incentives to further litigation, as both sides to this durable conflict press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each individual dispute. "Even the modicum or predictability which might otherwise inhere in the pattern of judicial precedents is impaired by the frequently reiterated judicial declaration that each case must be decided on its own facts." Van Alstyne, *supra*, fn. 6, at 2-3.

The case at bench is a good example. Here, the conduct of the defendants was unlawful, as eventually determined by the state courts. Yet that unlawful conduct irretrievably took a substantial part of Petitioner's leasehold; the entire property was rendered totally useless *for years*. As more fully discussed *infra*, the Sixth Circuit considered this very issue (whether such *temporary* unlawful deprivations of the use of one's property give rise to valid claims under the Fourteenth Amendment and 42 U.S.C. §1983), and concluded that they do; see *Gordon* v. *City of Warren*, 579 F. 2d 386 (6th Cir. 1978). Yet in the case at bench the Ninth Circuit casually dismissed that very same claim *because* the taking was "only temporary,"[6] thereby assuming away the central constitutional issue and creating conflict with the Sixth Circuit.

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[6]The court below evidently confused the temporary decline in value resulting from announced, and then abandoned, condemnation plans, (a situation which leaves the fee simple title landowner in a position to use his land as values return to normal and his ownership continues undiminished), with a temporary taking of a portion of a leasehold that prevents the lessee from using his entire leasehold for years, thereby irretrievably depriving him *pro tanto* of his leasehold.

B. There Is Outright Conflict Between Circuits on the Issue of Temporary Regulatory Takings.

The present situation is wasteful of public and private resources, and has inspired positively chaotic conditions, and outright conflict between Circuits. Thus, the Sixth Circuit holds that a temporary deprivation of use of private land by local regulations eventually held invalid in state court proceedings, is a compensable temporary taking. *Gordon* v. *City of Warren, supra,* 579 F. 2d 386 (6th Cir. 1978); accord *Sixth Camden Corp.* v. *Township of Evesham,* 420 F. Supp. 707 (D.N.J. 1976).

But in the case at bench the Ninth Circuit, without analysis or reference to authority, simply brushed aside this important issue[7] with a casual statement that the ". . . deprivation was *only* temporary . . ." (Slip opinion, p. 5, Appendix A, p. 4, emphasis added).

So far Petitioner has been deprived of all use, value and return of its land *for seven years*. Can that be "only" temporary? *A fortiori*, since Petitioner's interest was, to begin with, a leasehold, can an unlawful *pro tanto* destruction of it, so that part of it is irretrievably gone, be dismissed as "only" temporary?[8] But aside from such semantic dispar-

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[7]The results reached by the Sixth Circuit have also been the law in a number of states; see *Lomarch Corp.* v. *Englewood*, 237 A. 2d 41 (N.J. 1968); *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd. 389 N.Y.S. 2d 895 (App. Div. 1976), rev'd and remanded, 45 N.Y. 2d 894, 383 N.E. 2d 560 (N.Y. 1978); *City of Austin* v. *Teague*, 570 S.W. 2d 389 (Tex. 1978).

[8]With all due respect, the Court below evidently forgot that the law of "just compensation" applies to temporary as well as permanent takings. In the temporary takings of World War II this Court repeatedly held just compensation payable. Some of the landmark World War II decisions of this Court arose from cases where the taking (including that of a leasehold) was admittedly temporary. See *U.S.* v. *General Motors Corp.*, 323 U.S. 373 (1945), *Kimball Laundry Co.* v. *U.S.*, 338 U.S. 1 (1949). As these two cases demonstrate, the measure of compensation in temporary takings may be, if anything, greater than in a permanent taking of fee simple title. It should be remembered that World War II only lasted three-and-a-half years. Here, Petitioner's property has been taken for some seven years.

agement and even on the Court of Appeals' erroneous premise, the government can no more commandeer private property temporarily than permanently (see *e.g.*, *Smith* v. *U.S.*, 458 F. 2d 1231 (9th Cir. 1972).[9] The same is true of regulatory takings; *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 653-654 (Brennan, J., dissenting from dismissal of appeal, but on the issue of remedies intimating the views of five members of this Court — see Rehnquist, J., concurring, 450 U.S. at 633).

II.

THE TAKING CRITERIA OF *PENN CENTRAL* HAVE BEEN SATISFIED IN THE CASE AT BENCH.

In *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 124, this Court set up the factors of "particular significance" in determining whether a taking has occurred. All of these are present at bench.

> *First*, "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." 438 U.S. at 124
>
> Here, the impact on the claimant has been total: for most of a decade, the claimant has been completely deprived of all use, or return on his leasehold. Unlike diminution of value (which may eventually be undone by a rising market) the Petitioner's status as lessee makes the injury completely irreversible; nearly one-sixth of its ownership is completely gone. During that time, moreover, the state (acting through its political subdivision, the County) continued to exact a heavy investment from Petitioner, by insisting that Petitioner

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[9]The "taking" for which just compensation must be paid is the deprivation of the owner of his property interest, and does not depend on accretion of any right to the taker. *U.S.* v. *General Motors Corp.*, *supra*, 323 U.S. at 377-378.

pay rents and taxes on his leasehold, even as he was being prevented unlawfully from putting the leased land to any use whatever, and even as his leasehold period was irretrievably ticking away.

As Mr. Justice Brennan put it in *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 657:

"The fact that a regulatory 'taking' may be tem porary, by virtue of the government's power to rescind or amend the regulations, does not make it any less of a constitutional 'taking'."

Second, while the invasion of property rights here was not physical, it was also not a case of ". . . adjusting the benefits and burdens of economic life to promote the common good." (cf. 438 U.S. at 124) Here, the "regulation" was a mere pretext, and was eventually held unlawful by the state courts whose rulings were acceded to by the Coastal Commission. Yet, this pretended pursuit of the public good was the ostensible rationale for depriving Petitioner of all use of all its property for years.

Third, Petitioner's leasehold interest is unquestionably a constitutionally protected property right (cf. 438 U.S. at 124-125).

Fourth, the gravamen of Petitioner's case is that it was deprived of *all* reasonable, economically viable uses of its property while Respondents went on with their unlawful "regulation"; *i.e.*, Petitioner was not merely prevented from using its property for some particular use (cf. 438 U.S. at 125), but for *any* economically viable uses (see particularly the Court's discussion at 438 U.S. at 127-128 concerning the implications of *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962) and of *Armstrong* v. *U.S.*, 364 U.S. 40 (1960)). As a result, about one-eighth of Petitioner's leasehold is gone forever. Beyond that, Petitioner was required to pay taxes and rent to the very government which prevented it from using the property at all.

Finally, in contrast with *Penn Central*, here a state tribunal concluded that this "regulation" was unlawful (cf. 438 U.S. at 125).

In sum, all the earmarks of a regulatory taking under *Penn Central* are present here. The court below denied relief solely because of its mistaken view that private property may be taken without compensation if that is done "only temporarily." That, conclusion, however, is conceptually in error,[10] it creates direct conflict with *Gordon* v. *City of Warren*, *supra*, and disregards a long line of this Court's decisions holding that just compensation must be paid for temporary takings.

III.

APART FROM THE TAKING ISSUE, THE COMPENSATION ISSUE HAS PRODUCED A WELTER OF CONFLICTING AND IRRECONCILABLE APPROACHES AMONG STATE AND FEDERAL COURTS, ALL CLAIMING TO CONSTRUE THE "JUST COMPENSATION" CLAUSE OF THE FIFTH AMENDMENT, QUARRELING WITH ONE ANOTHER AND SOME SIMPLY DEFYING THIS COURT.

A. When Deciding Questions of Remedies for Uncompensated Takings, This Court Has for the Past Half-Century Consistently Opted for Compensation as the Proper Remedy.

There is little that can be added to the above subheading; this Court's decisions speak for themselves. See *Hurley* v. *Kincaid*, 285 U.S. 95 (1932); *Dugan* v. *Rank*, 372 U.S.

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[10]Even a casual contemplation of the "bundle of sticks" concept of property, discloses at once that a number of important and valuable property rights (leaseholds, life estates, and options, to name but a few examples) are inherently temporary in their duration. The court below evidently did not reflect on the fact that its "only temporary" justification, for all practical purposes, amounts to a ruling that only deprivations of estates of indefinite duration (*e.g.*, fee simple absolute) can be the subject of a "taking," and other property interests can be snuffed out by the government without compensation. A large body of law dealing with temporary takings makes such a concept legally — to say nothing of ethically — impermissible; see 450 U.S. at 657-658. If the ruling below were sound, the government would have no need to pay for leases; it would instead take "only temporarily" and ignore its duty to pay just compensation.

609 (1963); *Fresno* v. *California*, 372 U.S. 627 (1963); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950); *The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974); *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Dames & Moore* v. *Regan*, 453 U.S. 654, 689-690 (1981); *Loretto* v. *Teleprompter Manhattan CATV*, ... U.S. ..., 73 L. Ed. 2d 868, 886 [14], 102 S. Ct. ... (1982).

And yet, in spite of this clear and consistent line of the highest authority, definitively construing the remedial attributes of the Taking Clause, the pattern of the lower courts — state and federal — is simply chaotic.

B. The State Court Decisions on Remedies Cannot Be Organized Into Any Legal or Intellectual Pattern; They Are Irreconcilable With Decisions of This Court and With One Another.

At one end of the spectrum are the "absolutist" states which flatly refuse to permit awards of just compensation no matter how egregious the taking affected by harsh regulations. See *Agins* v. City of Tiburon, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P. 2d 55 (1979), aff'd on other grounds, 447 U.S. 255 (1980); *Davis* v. *Pima County*, 590 P. 2d 459 (Ariz. App. 1978); *Wyoming Borough* v. *Wyco Realty Co.*, 440 A. 2d 696 (Pa. Cmwlth. 1981).

California, alas, in this legal area evidently means to live up to its general "far out" image; two decisions of its intermediate appellate court have gone *Agins* one better, and have for all practical purpose defied the Supremacy Clause by holding that notwithstanding the Federal Civil Rights Act's (42 U.S.C. §1983) express provision for monetary relief in an action at law (see *Lake Country Estates* v. *Tahoe Regional Planning Agency, supra*, 440 U.S. 391 (1979)), they mean to award no compensation even where

relief is sought under §1983. See *Gilliland* v. *County of Los Angeles*, 126 Cal. App. 3d 610, 617, 179 Cal. Rptr. 73, 78 (1981), holding *expressly* that notwithstanding 42 U.S.C. §1983, the California Supreme Court's *Agins* decision means that monetary relief under §1983 would be "inappropriate."[11] Even more egregious is the companion case of *Gilliland* v. *City of Palmdale*, 179 Cal. Rptr. 627 (1981). In the latter case, the California Court of Appeal analyzed pertinent law, and coincidentally using Justice Brennan's exact words in *San Diego Gas & Electric Co.* v. *City of San Diego, supra*, 450 U.S. at 651, concluded that "California's position flatly contradicts clear precedent of United States Supreme Court cases," 179 Cal. Rptr. at 631. However, the California Supreme Court, instead of addressing this troublesome issue[12] ordered this *Gilliland* opinion not

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[11]"In view of that [*Agins*] decision, the remedy of monetary damages would be unavailable in any event, *whether the action were brought in inverse conmdemnation or under the Federal Civil Rights Act.*" (126 Cal. App. 3d at 617, 179 Cal. Rptr. at 78, emphasis added.) This simply defies this Court's views in *Testa* v. *Katt*, 330 U.S. 386 (1947) and in the *Second Employees' Liability Cases*, 223 U.S. 1 (1912), concerning the state courts' duty under the Federal Supremacy Clause to give effect to federal laws. With regard to monetary liability under §1983 for onerous land use regulations, see *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra.*

[12]By now the issue is acutely troublesome because the Ninth Circuit, in a recent opinion, expressly disagreed with the California *Agins* rule; see *In re Aircrash in Bali, etc.*, 684 F. 2d 1301, 1311, fn. 7, following Mr. Justice Brennan's views in *San Diego Gas & Electric*. In contrast, the opinion at bench (slip opinion, p. 5, Appendix A, p. 5.) disparages those views. Since California lies within the Ninth Circuit, one must thus conclude that governing federal constitutional law in the nation's most populous and litigious geographic area is dependent on which court tries the suit. Corrective action by this Court is urgently needed; see Rule 17(1)(b), Revised Rules of the Supreme Court of the United States.

to be published in the official reports, thereby censoring it out of California law.[13]

At the other end of the spectrum are what might be termed "strict construction" states which adhere to the position that the "just compensation" language of the Constitution(s) compels a monetary remedy; these jurisdictions generally reason along the lines articulated by this Court in *Hurley* v. *Kincaid, supra*, and its progeny. See *Village of Willoughby Hills* v. *Corrigan*, 278 N.E. 2d 658 (Ohio 1972), cert. den. sub. nom. *Chrongris* v. *Corrigan*, 409 U.S. 919 (1972), Douglas, J., dissenting (opinion); *Clifton* v. *Berry*, 259 S.E. 2d 35 (Ga. 1979). Two New England states recently endorsed this approach by dictum: *Milardo* v. *Coastal Resources Man. Council*, 434 A. 2d 266 (1982, R.I.); *Hamilton* v. *Conservation Comm'n.*, 425 N.E. 2d 358 (1981, Mass. App.).

Somewhere between these two polarized views are what one might call the "flexible approach" states. These jurisdictions either:

> a) Allow both specific relief and monetary damages to the extent losses are shown: *City of Austin* v. *Teague*, 570 S.W. 389 (Tex. 1978); *Ventures in Property I* v. *City of Wichita*, 594 P. 2d 671 (Kan. 1979); *Brazil* v. *City of Auburn*, 598 P. 2d 1 (Wash. App. 1979); Also see, *Sheer* v. *Township of Evesham*, 445 A. 2d 46 (N.J. Super. 1982), or

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[13]The California Supreme Court wields the plenary power simply to order the State Reporter of Decisions not to publish a Court of Appeal opinion in the official reports, thereby — in the words of California's premier legal commentator — ". . . taking it out of the class of citable precedent . . .", Witkin, *Manual on Appellate Court Opinions*, (West, 1977), at p. 35. Thus, although this opinion was originally published in the official California advance sheets at 127 Cal. App. 3d 386, it now appears only in the "unofficial" reports at 179 Cal. Rptr. 617.

b) Express a preference for specific relief (*i.e.*, invalidation of the harsh regulation), but with the proviso that in circumstances where specific relief is not effective, damages are to be awarded. See, *Hermanson* v. *Board of Comm'rs.*, 595 P. 2d 694 (Colo. App. 1979); *Kraft* v. *Malone*, 313 N.W. 2d 758 (N.D.), *Moviematic Industries, Inc.* v. *Dade County*, 349 So. 2d 667, 672 (Fla. App. 1977)[14]

c) Then there is New York whose law defies classification. On the one hand New York purports to hold that invalidation is the only remedy, unless there has been physical invasion or direct legal control of the affected property, or where the injury suffered is irreversible. *Fred F. French Investing Co.* v. *City of New York*, 39 N.Y. 2d 587, 350 N.E. 2d 381 (N.Y. 1976). Yet, on the other hand, New York has steadfastly refused to compensate even in the face of physical invasion (see, *New York Telephone Co.* v. *North Hempstead*, ... N.Y. 2d ...., 363 N.E. 2d 694 (N.Y. 1977), *Loretto* v. *Teleprompter Manhattan CATV, supra*, 53 N.Y. 2d 124, 423 N.E. 2d 320, reversed, ... U.S. ...., 73 L.Ed. 2d 868 (1982)) or irreversible injury (see, *Charles* v. *Diamond*, 41 N.Y. 2d 318, 360 N.E. 2d 1295 (N.Y. 1977)).

To confound New York's law even further, while the above case law was being decided, the courts of New York routinely awarded damages for interim losses due to temporary *de facto* taking effected by a harsh regulation in *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd 389 N.Y.S. 2d 895 (App. Div. 1976), rev'd and remanded, 45 N.Y. 2d 894, 383 N.E. 2d 560 (1978).

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[14]In spite of the dictum at the end of the *Moviematic* opinion, there are inconsistencies in Florida law; compare *Mailman Dev. Corp.* v. *Hollywood*, 286 So. 2d 614 (Fla. App. 1973), with *Askew* v. *Gables-by-the-Sea*, 333 So. 2d 56 (Fla. App. 1976).

To add a contentious touch to this sea of inconsistency, some of these state courts go out of their way to disagree with one another; see *e.g.*, *Eck* v. *City of Bismarck*, 283 N.W. 2d 193 (N.D. 1979), disagreeing with the sweep of California's *Agins* decision, and particularly *Burrows* v. *City of Keene*, 432 A. 2d 15, 20 (N.H. 1981), where the new Hampshire Supreme Court expressly "reject[ed] out of hand" the California *Agins* approach because, *inter alia*, it is ". . . in violation of the Constitution of the United States . . ." (*Id.*)[15] Yet all these courts purport to be following the law and construing the same provision of the federal Constitution.

C. The Circuits Are in Conflict.

As noted, the Ninth and District of Columbia circuits have opted for monetary damages ("just compensation") as a remedy for takings. *In re Aircrash in Bali, etc.*, *supra*, 665 at 1311; *Persinger* v. *Islamic Republic of Iran*, *supra*, 690 F. 2d at 1024-1025. So has the Fifth: *Hernandez* v. *City of Lafayette*, 643 F. 2d 1188 (5th Cir. 1981), *Wheeler* v. *City of Pleasant Grove* (5th Cir. 1981), 644 F. 2d 99. So has the Seventh: *Devines* v. *Moier*, 665 F. 2d 758 (7th Cir. 1981). So has the Sixth: *Gordon* v. *City of Warren*, *supra*.

However, the First Circuit takes a diametrically opposite position, evidently choosing to follow the absolutist California *Agins* position, rejected by the other Circuits; see

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[15]This is also the view of the Ninth Circuit; *In re Aircrash in Bali, etc.*, *supra*, 684 F. 2d 1301, 1311, fn. 7 (9th Cir. 1982), where the court pointedly noted that California's *Agins* ruling does not appear to be the law.

Pamel Corp. v. *Puerto Rico Highway Authority*, 621 F. 2d 33, 35 (1st Cir. 1980).[16]

This Court's intervention is urgently needed, if nothing else, to let the federal trial bench know which rule to follow.

Petitioner respectfully urges that the prevailing situation thus invokes the criteria for this Court's intervention, set forth in Rule 17(1).

IV.

THE ELEVENTH AMENDMENT ISSUE ALLUDED TO IN THE COURT OF APPEAL OPINION IS NOT DISPOSITIVE BECAUSE THERE REMAIN INDIVIDUAL DEFENDANTS.

There is little to be added to the above heading. Even if the court below had considered the Eleventh Amendment issue (see Appendix A, p. 6.) and resolved it adversely to Petitioner,[17] that would not dispose of the case, as the question of liability of the individual defendants remains as a viable issue. See *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 319 (1979).

Accordingly, such issue presents no obstacle to this Court's determination of the taking/compensation issue

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[16]Thereby, the same conceptual anomaly now exists in New England as in California. New Hampshire is within the First Circuit, yet it interprets the Fifth Amendment's remedial aspects contrary to its federal circuit's view, albeit this conflict is the converse of California which disagrees with its [Ninth] Circuit. Manifestly both views cannot possibly be correct. This is intellectual chaos.

[17]While the Eleventh Amendment issue is not presented here for review, it should be noted in passing that California, by its Constitution (Art. I, §19) has consented to suit for takings of property: *Rose* v. *State of California*, 19 Cal. 3d 713, 722, 123 P. 2d 505 (1942), and that the rule of *Hans* v. *Louisiana*, 134 U.S. 1 (1890) is therefore inapplicable. Moreover, California Public Resources Code §30334(b) expressly provides that the Coastal Commission may, *inter alia*, be sued ". . . before *any court*, board or agency of the state or *federal government*", emphasis added. The waiver can thus hardly be more explicit.

which was viewed as dispositive by the Court below, and remains such now, wholly apart from any Eleventh Amendment issues.

CONCLUSION.

In the end, the idea articulated by this Court in *Lynch* v. *Household Finance Co.*, 405 U.S. 538, 552 (1972) says it all: not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other liberties protected by the Bill of Rights; "neither can having meaning without the other." A government that has it within its whim to strip citizens of their lawfully accumulated property, of their material well-being on which rests the day-to-day security of their families, has little need for overtly invading their other seemingly protected liberties. That is the teaching of logic and the verdict of history.

Substantive rights, even of constitutional dimension, have no meaning unless their theoretical beneficiaries can avail themselves of realistic remedies that make those rights a reality. To say, as did the Court below, that one may be prevented from using his leasehold for a eighth of its term, encompassing over a half-dozen years, and then be denied any relief because the outrage was "only temporary" is shocking. *A fortiori* this is so where delay is so often the wrongdoers' openly and cynicaly chosen means of subverting the very constitutional rights asserted by the victim (see *San Diego G. & E. Co.* v. *City of San Diego, supra*, 450 U.S. at 654-657, particularly fn. 22).

Both the equities of this factual situation and the urgent national need for clarification of the substantive and remedial aspects of this litigation-spawning "taking/compensation issue" (which is increasingly baffling even the ex-

perts, to say nothing of the bewildered trial bench and bar) cry out for intervention by this Court.

January 1983.

Respectfully submitted.

HILLEL CHODOS,
GIDEON KANNER,
Attorneys for Petitioner.

APPENDIX A.

Memorandum.

In the United States Court of Appeals for the Ninth Circuit.

INTERSTATE MARINA DEVELOPMENT CO., Plaintiff-Appellant, v. THE STATE OF CALIFORNIA, et al., Defendants-Appellees. No. 81-5312.

Filed: August 23, 1982.

Appeal from the United States District Court for the Central District of California, Malcolm M. Lucas, District Judge, Presiding.

Argued and Submitted: June 10, 1982.

Before: CHAMBERS and GOODWIN, Circuit Judges, and SOLOMON,* Senior District Judge.

Interstate Marina Development Corporation (IMDC) appeals the order dismissing its action against the State of California, the California Coastal Commission (State Commission), and the Coastal Commissioners for damages for delay in obtaining a coastal development permit. IMDC also appeals from the order dismissing its pendent state claims.

IMDC is a limited partnership holdinng a 60-year lease on approximately four acres of county-owned land in Marina Del Rey, California. IMDC's lease required it to build restaurants, hotels, apartments, and other facilities on the land, and to obtain the necessary permits for that construction from the appropriate regulatory agencies.

IMDC applied for a coastal development permit under the California Coastal Zone Conservation Act of 1972. Marina Plaza, which shares a general partner with IMDC,

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*The Hon. Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

also applied for a permit for a project on other land in the area. In February, 1976, the South Coast Regional Commission (Regional Commission), a subdivision of the State Commission, denied IMDC's application. The State Commission refused to hear the appeal. IMDC brought actions in both state superior court and federal district court. The district court abstained until the California Court of Appeals upheld the State Commission's ruling in *Marina Plaza v. California Coastal Zone Conservation Commission*, 73 Cal. App. 3d 311, 140 Cal. Rptr. 725 (1977). The district court then reassumed jurisdiction.

In January, 1979, the Regional Commission agreed to a remand of IMDC's application under the Coastal Act of 1976, and granted an unconditional permit to build the hotel complex. On appeal to the State Commission, IMDC's and Marina Plaza's applications were consolidated. The State Commission granted the permits, but imposed restrictions on the size and design of the projects. IMDC contends that the restrictions made the project uneconomic and unfairly tied the IMDC project to the Marina Plaza project. IMDC sought a Writ of Mandamus to set aside these restrictions. The State court granted the Writ. The State Commission later issued an appropriate permit with fewer restrictions.

IMDC amended its complaint in federal district court. IMDC contended that (1) because of delay caused by litigation, the State has in effect taken part of IMDC's leasehold interest without compensation, in violation of the Fifth and Fourteenth Amendments; and (2) the State Commission has violated the Contracts Clause by impairing IMDC's lease with Los Angeles County. IMDC sought lost rent, increased costs, and other expenses as damages. IMDC also asserted pendent claims based on state law.

The district court dismissed the Fifth Amendment claim. IMDC appealed this dismissal before the district court de-

cided the Contracts Clause issue. The appeal was dismissed under Ninth Circuit Rule 19(b)[1] for failure to prosecute.

The district court granted summary judgment against IMDC on the Contracts Clause issue, and then dismissed IMDC's pendent state claims. IMDC appeals from all of the orders of the district court. We affirm.

I. RES JUDICATA EFFECT OF RULE 19(b) DISMISSAL

The defendants contend that the doctrine of Res Judicata bars IMDC from raising the Fifth Amendment claim in this appeal, because the first appeal was dismissed under Ninth Circuit Rule 19(b) for failure to prosecute. We disagree.

The order dismissing IMDC's Fifth and Fourteenth Amendment claims was an interlocutory order, not appealable without an express direction for the entry of judgment. Fed. R. Civ. P. 54(b). No such direction was made here. Therefore, the order which dismissed only some of the claims is not a final order appealable under 28 U.S.C. § 1291. *Fletcher* v. *Gagosian*, 604 F.2d 637, 638 (9th Cir. 1979); *Huckeby* v. *Frozen Food Express*, 555 F.2d 542, 546 (5th Cir. 1977).

IMDC's failure to prosecute the appeal of an unappealable order does not bar it from raising the same issue in this appeal from the final judgment.

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[1]Ninth Circuit Rule 19(b) provides:

Dismissal for Failure to Prosecute

When an appellant fails to timely file the record, pay the docket fee, file a brief or otherwise comply with rules requiring processing the appeal to hearing, the Clerk will enter an order dismissing the appeal. The Clerk will notify each appellant in writing of this provision of the rules.

II. INVERSE CONDEMNATION OF IMDC'S LEASEHOLD INTEREST.

IMDC contends that the regulatory activities of the State Commission constituted a taking without just compensation, in violation of the Fifth Amendment. IMDC joined as defendants, not only the State of California, but also the members of the Commission, acting in both their individual and official capacities.

The district court dismissed all of IMDC's claims against both the State and the Commission, on Eleventh Amendment immunity grounds. *Edelman v. Jordan*, 415 U.S. 651 (1974). The court then dismissed the inverse condemnation claims against the other defendants because there was no unconstitutional taking of property. The court relied on *Agins v. Tiburon*, 447 U.S. 255, 260-61 & n. 9 (1980), a case in which a zoning ordinance restricted the number of houses that the property owners could build on their land. The *Agins* Court held that the ordinance did not effect a taking because the owners did not show that the ordinance denied them all economic uses of their land. *Id.* at 260. On the property owner's contention that the city's precondemnation activities constituted a taking, the Court said:

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." [citations omitted]

Id. at 263, n. 9. Here, even assuming that IMDC adequately alleged that the State Commission's action deprived the lease of substantially all value, that deprivation was only temporary. When the restrictions were set aside, the property regained its value. IMDC does not assert that the delay

was extraordinary. The delay, therefore, did not constitute a 'taking' in the constitutional sense.

IMDC urges us to ignore the language in *Agins* and follow Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 658-59 (1981), which asserts that damages may be awarded for temporary takings. There may be circumstances in which a delay entitles a property owner to damages; but this is not one of them.

III. VIOLATION OF THE CONTRACTS CLAUSE.

IMDC asserts that under its lease with the County of Los Angeles, it was entitled to build a hotel complex, and that the restrictions on the project, before they were removed, temporarily defeated the intentions of the parties to the lease for the development of the property. IMDC therefore contends that the defendants violated Article I, Section 10 of the Constitution, which prohibits states from passing laws which impair the obligations of contracts. The district court granted the defendants' motion for summary judgment and held that there was no evidence that any of the defendants' actions impaired Plaintiff's contract obligations. We agree.

The lease signed by IMDC and the County of Los Angeles stipulated that IMDC must obtain appropriate permits before it develops the leased property. The lease does not guarantee IMDC the right to a permit, nor does it provide that the land shall be free of permit restrictions. The defendants' actions did not affect any of IMDC's rights or obligations under the lease. *See Northwestern National Life Insurance Co.* v. *Tahoe Regional Planning Agency*, 632 F. 2d 104, 106 (9th Cir. 1980). Even without the permit provision, the parties could not contract to restrict the State's ability to restrict development of coastal areas. *See Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908).

IV. OTHER ISSUES

IMDC contends that its action asserts a valid claim against the State under the Fifth and Fourteenth Amendments, *see Weiss* v. *Lehman*, 642 F. 2d 265 (9th Cir. 1981), and that Eleventh Amendment immunity does not bar a direct constitutional claim. IMDC also contends that California has waived its Eleventh Amendment immunity by statute. Because we hold that IMDC has no claim under either the Fifth Amendment or the Contracts Clause, we express no opinion on these other issues.

AFFIRMED.

APPENDIX B.

Order.

United States Court of Appeals for the Ninth Circuit.

INTERSTATE MARINA DEVELOPMENT COMPANY, Appellant v. THE STATE OF CALIFORNIA, et al., Appellees. No. 81-5312.

Filed: October 12, 1982.

Before: CHAMBERS and GOODWIN, Circuit Judge, and SOLOMON,* District Judge

Appellant's petition for rehearing is denied.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1174
IN THE

Supreme Court of the United States

October Term, 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT; LOIS EWEN; HARRIET ALLEN; MILDRED BENIOFF; HANK DOERFLING; MARY HENDERSON; HELEN MCABOY; JUDY ROSENER; JOHN RUSH; NAOMI SCHWARTZ; LYNN SCHENK; and RICHARD GOLDEN, each individually and as members of the California Coastal Commission; MICHAEL FISCHER, individually and as Executive Director of the California Coastal Commission; CALIFORNIA COASTAL COMMISSION, an agency of the State of California; and THE STATE OF CALIFORNIA,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Memorandum of Decision and Order of Dismissal.

United States District Court, Central District of California.

Interstate Marina Development Co., a limited partnership, Plaintiff, v. The State of California; California Coastal Commission, etc.; Michael Fischer, etc.; Dorill B. Wright; Lois Ewen; Harriet Allen; Mildred Benioff; Hank Doerfling; Judy Rosener; John Rush; Naomi Schwartz; Lynn Schenk; and Richard Golden, Defendants. No. CV-76-3270-MML.

Filed: October 23, 1980.

Plaintiff in this case has filed suit against the State of California; the California Coastal Commission; the executive director of the Coastal Commission, Michael Fischer; and the individual members of the Commission, both as individuals and in their official capacities. Plaintiff's claims arise from regulatory activities by the Commission over an approximately four year period.

Now before the Court is defendants' motion to dismiss the action for failure to state a claim for relief, or in the alternative to abstain from hearing the case. After careful consideration of the issues raised by the parties, the Court finds that dismissal must be granted as to some defendants, and as to some claims for relief. On those issues which remain, this Court declines to abstain, on the grounds that the issues are not so doubtful that they require preliminary interpretation by the state courts.

The Court orders dismissal as to the following defendants:

1. *All claims against the defendant State of California must be, and are dismissed.*

   The Eleventh Amendment has long been a bar to suit against a state by citizens of another state, or by the state's own citizens. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1973). As set forth in the opin-

ions of the United States Supreme Court, that immunity can be waived only by express Congressional action or by express waiver by the State itself.

In enacting 42 U.S.C. §1983 pursuant to §5 of the Fourteenth Amendment, Congress did not abrogate the Eleventh Amendment immunity of the States. *See Quern v. Jordon*, 440 U.S. 332 (1979). Bringing an action directly under one of the Constitutional amendments applicable to the states by virtue of the Fourteenth Amendment does not result in automatic waiver of the Eleventh Amendment. *See Alabama v. Pugh*, 438 U.S. 781 (1978).

California has not waived its immunity by virtue of California Public Resources Code §30334(b). The statute does not acknowledge liability for the actions of the Coastal Commission, but simply provides that the California attorney general will represent the Commission in litigation. This does not constitute an express waiver of immunity by the State.

2. *All monetary claims against the defendant California Coastal Commission must be, and are, dismissed.*

The California Coastal Commission, as an arm of the state, may not be sued for monetary damages. A recovery of damages against the agency would in reality subject the state treasury to liability, a result the Eleventh Amendment forecloses. *Edelman v. Jordan*, 415 U.S. 651 (1973). However, to the extent that plaintiff's suit seeks prospective declaratory or injunctive relief, it may still be maintained against the Commission.

3. *All claims against defendant Michael Fischer must be, and are, dismissed.*

Plaintiff has failed to state any facts which would

give rise to a cause of action or claim for relief against Fischer. All actions plaintiff alleges as the basis for this suit were performed by either the South Coast Regional Commission or the State Coastal Commission.

4. *All monetary claims against the Coastal Commissioners acting in their official capacity are dismissed.*

As with suit against the Coastal Commission, a monetary award against these officials would subject the state treasury to liability, and is therefore prohibited by the Eleventh Amendment. Prospective declaratory or injunctive relief could still be awarded against these defendants.

These defendants have also been sued individually. The Eleventh Amendment does not act as a shield in this situation, since recovery would not be had from the state treasury. *Ex Parte Young*, 209 U.S. 123 (1908); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). These officials may still be entitled to either absolute or qualified immunity for actions performed in the course of their official duties. The extent of this immunity cannot be decided on the basis of the papers and pleadings now before the Court. The question is therefore reserved for further proceedings.

The Court orders dismissal of the following claims for relief as to all defendants, on the grounds that they fail to state a claim for relief:

1. Plaintiff's Count Two for inverse condemnation is dismissed on the ground that the denial of a permit, like other planning activities, does not result in a permanent deprivation of property. There can be no unconstitutional taking of property where the party

is not permanently deprived of all reasonable use of its property. As demonstrated by the fact that plaintiff now has a permit to build, there has been no unconstitutional taking. *See Agins v. Tiburon*, 100 S.Ct. 2138, 2142-43 & n. 9 (1980).

2. Plaintiff's Count Three for unconstitutional taking and damaging of private property is dismissed on the ground that even if plaintiff's ability to develop its land was hampered by defendants' refusal to grant a permit, there is no taking in the constitutional sense since plaintiff is now free to sell or develop its property. *Agins v. Tiburon*, 100 S.Ct. 2138, 2142-43 & n. 9 (1980).

3. Plaintiff's Count Four alleges that the unconstitutional taking effected by defendants also violated plaintiff's civil rights. Since no claim of inverse condemnation or unconstitutional taking has been or could be plead by plaintiff, the dependent civil rights claim must also be dismissed.

Plaintiff's Count One, requesting declaratory relief on the issue of whether the State Commission could condition the Interstate Marina permit on the procurement by Marina Plaza of a construction bond is now moot, since the state court has decided this issue in plaintiff's favor.

The Court will retain jurisdiction over Count Five, which alleges an unconstitutional impairment of contract. The Court will also exercise its pendent jurisdiction over Count One, to the extent it requests declaratory relief on the issue of whether the Coastal Commission's refusal to hear the first appeal from the South Coast Regional Commission for lack of a substantial issue was res judicata and the second appeal therefore invalid. These issues do not turn on unclear issues of state law, nor would the determination of the state

law issue limit the constitutional question now before this Court. Plaintiff's motion for abstention is therefore denied.

THEREFORE, IT IS ORDERED that defendants' Motion to Dismiss is granted as to

1. Defendant State of California, on all claims, on Eleventh Amendment grounds;

2. Defendant Coastal Commission, on all claims for monetary relief, on Eleventh Amendment grounds;

3. Defendant Michael Fischer, on all claims, on the grounds that plaintiff has failed to allege any facts on which relief could be granted;

4. Defendants, the individual Coastal Commissioners sued in their official capacities, on all claims for monetary relief, on Eleventh Amendment grounds;

5. Plaintiff's Counts Two, Three, and Four, on the grounds that they fail to state a claim for relief;

6. Plaintiff's Count One requesting declaratory relief on the issue of the conditioning of its permit on the Marina Plaza project is moot, since the condition has been invalidated by the State court; and

7. Defendants' Motion for Abstention is denied, on the grounds that abstention is inappropriate where the state law issues are neither determinative nor unclear.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Memorandum and Order on counsel for plaintiff and counsel for defendants in this matter.

Dated: October 22, 1980.

/s/ Malcolm M. Lucas
Malcolm M. Lucas
United States District, Judge

Office-Supreme Court, U.S.
FILED
MAR 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1174
IN THE

Supreme Court of the United States

October Term 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION.

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Question Presented.

In this suit, a developer, with a leasehold interest, has accepted a conditional permit authorizing the construction of a nine story 300 room hotel from a state agency. The question raised is whether, despite the Eleventh Amendment, that developer may now seek damages for an unconstitutional taking of property from the state agency which issued him this permit solely on the basis of the delay which occurred between the time the permit was initially applied for and the time it was finally issued in the absence of an allegation that this delay was extraordinary or a showing that a final judgment was entered declaring the state agency's intervening actions were unconstitutional?

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No. 82-1174

IN THE

Supreme Court of the United States

October Term 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION.

Respondents Dorill B. Wright, Lois Ewen, Harriet Allen, Mildred Benioff, Hank Doerfling, Mary Henderson, Helen McAboy, Judy Rosener, John Rush, Naomi Schwartz, Lynn Schenk, Richard Golden, Michael Fischer, the California Coastal Commission and the State of California respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's unpublished memorandum decision in *Interstate Marina Development Co. v. The State of California*, No. 81-5312.

JURISDICTION.

Respondents agree that the jurisdictional basis for petitioner's action in the U.S. District Court was based on 28 U.S.C. section 1343 as well as 28 U.S.C. 1331. Petitioner, however, abandoned 28 U.S.C. section 1343 as a jurisdictional basis in its briefs filed with the Ninth Circuit when it admitted that the Eleventh Amendment to the United

States Constitution barred its suit under 42 U.S.C. section 1983. (See Appellant's Opening Brief in the Ninth Circuit, p. 25.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the Fifth and Fourteenth Amendments to the United States Constitution cited by petitioner, this case also involves the Eleventh Amendment to the United States Constitution which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens of a foreign State."

Moreover, as discussed *supra* under Jurisdiction, this case, contrary to petitioner's assertion, no longer involves 42 U.S.C. section 1983 inasmuch as petitioner waived any right to seek relief under that provision on the basis of its argument to the Ninth Circuit Court of Appeals. (Appellant's Opening Brief in the Ninth Circuit, p. 25.)

STATEMENT OF THE CASE.

A. Nature of the Case.

In this case, the Interstate Marina Development Co. (hereinafter "IMDC") has received and accepted a permit from the California Coastal Commission (hereinafter the "Commission") for the construction of a nine story 300 room hotel (hereinafter the "Marina Belle") in Marina del Rey, California. What IMDC is seeking from the federal courts is damages for the expenses petitioner incurred in obtaining this permit and altering the conditions which had originally been proposed to be placed on its issuance.

The basic premise underlying petitioner's suit is that if interim damages can be awarded for delays resulting from

regulatory actions which violate the Fifth Amendment, interim damages should also be awarded for regulatory actions which, though merely unlawful, nonetheless have the same practical effect as an action which has violated the Fifth Amendment.

In resting its claim for relief on such a basis petitioner has simply chosen to ignore the fact that no final state court judgment has ever existed declaring any action on IMDC's permit application unlawful let alone unconstitutional and that by virtue of a stipulated order in the California Court of Appeal, no final state court judgment can ever exist declaring the Commission's intervening actions on IMDC's permit application unlawful.

Furthermore, in continuing to seek damages from the state defendants herein, petitioner has also ignored the consequences of its admission to the Ninth Circuit that no claim for relief for damages existed under 42 U.S.C. section 1983 because of the Eleventh Amendment.

In short, this case represents an attempt by petitioner to radically expand the scope of the damage remedy available under the Fourteenth Amendment upon the basis of facts which have not existed and cannot exist.

B. Statement of Facts.

Because petitioner's statement of facts is misleading on several points and because it omits mention of matters which are significant and relevant to the issues which the Court must decide, respondents offer their own statement as follows:

1. On November 7, 1972 the People of the State of California adopted as an initiative measure the California Coastal Zone Conservation Act of 1972 (hereinafter the "1972 Act") former California Public Resources Code section 27000 *et seq.* Under the 1972 Act, the California

Coastal Commission and six regional commissions were established and were directed to submit to the California legislature a coastal plan for preservation, restoration and enhancement of the coastal zone. (*Beck v. State of California* (1979) 479 F.Supp. 393, 394-395.) In order to assure that the purposes of the 1972 Act were not impaired during the period in which the plan was in the process of formation, those seeking to perform any development within the permit area were required to apply for a permit. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 253.) The 1972 Act was repealed by its own terms on December 31, 1976. (*Beck, supra,* at p. 394.)

2. On August 26, 1975, IMDC entered into a lease agreement with the County of Los Angeles which permitted it to construct the following types of development on county property (Parcel 141IT) in Marina del Rey, California: apartments, cabanas or trailer-cabanas; a hotel or motel; a restaurant and other related uses. However, IMDC's right to construct any of these structures under the lease was expressly made subject to its first obtaining a permit from regulatory bodies such as the Commission which had permit jurisdiction over construction on the subject parcel (C.R. document no. 88, Defendant's Notice of Motion and Motion for Summary Judgment, pp. 27, 29, 40), Supplemental Excerpt of Record pages 1, 3 and 4.

3. In December 1975 IMDC had completed plans for the Marina Belle and applied for a permit under the 1972 Act. On March 17, 1976, that application was denied. (E.R. p. 319.)

4. Petitioner responded by filing suit in the federal district court challenging this decision. However, the district court abstained from exercising jurisdiction over it until the summer of 1978.

5. In 1976, in response to the coastal plan submitted to it pursuant to the 1972 Act, the California Legislature enacted the California Coastal Act of 1976 (hereinafter the "1976 Act") section 30000 *et seq.* of the California Public Resources Code. This act became effective on January 1, 1977. Under the 1976 Act, each local government is required to formulate a local coastal plan for its area of jurisdiction within the coastal zone with the Commission having oversight authority to approve, modify or disapprove those plans as it deems necessary to carry out the provisions of the Act. The 1976 Act also provides for interim development controls designed to assure the implementation of the policies of the act pending the completion of the local coastal plans. In particular, it requires that prior to approving a proposed development, the Commission must find that the project is in conformity with the provisions of the 1976 Act and will not prejudice the ability of local governments to prepare a local coastal program that is in conformity with the provisions of the Act. (*Beck v. State of California, supra* at 394-395.)

6. In December, 1978, because of the repeal of the provisions of the 1972 Act under which IMDC's permit application had been denied, the Commission stipulated to a federal district court order remanding the application for further administrative consideration under the provisions of the 1976 Act. (E.R. p. 320.)

7. On August 15, 1979, on remand, the Commission approved IMDC's permit application for the Marina Belle subject to six special conditions. These conditions are set forth at E.R. pages 183-184.

8. Subsequent to this new action by the Commission, IMDC, in May 1980, filed its First Amended Complaint in the federal action (E.R. p. 58 *et seq.*) and simultaneously filed a state court action (*Interstate Marina Development*

Co. v. The State of California, Los Angeles Superior Court No. WEC 61422). In that complaint it attacked the Commission's decision to impose condition number one to its approval of the Marina Belle application in addition to continuing its assault on the original denial of that application under the 1972 Act. IMDC did not attack the other five conditions imposed by the Commission.

9. Condition number one required that before the Marina Belle could be built, IMDC would have to guarantee the construction of another project in Marina del Rey which was to be operated by its general partner (the Marina Plaza project). (E.R. p. 183.) The Commission's intent in imposing this condition was to assure that IMDC, in lieu of providing certain mitigation measures *on site* which were designed to compensate for the Marina Belle's adverse impact, would provide for them *offsite* by assisting in the construction of a project which contained them. In this fashion, the Marina Belle which was inconsistent with the policy standards of the 1976 Act as it had been applied for because it did not propose to include these mitigation measures, could be found consistent with those standards because, by virtue of the operation of condition one, it would assist in providing them at a nearby site controlled by its general partner. (E.R. pp. 185-192.)

10. In July, 1980, the state trial court invalidated condition one. The court found that this condition had been imposed in excess of the Commission's jurisdiction because it was not rationally related to the goals of the 1976 Act. (See a copy of the trial court's findings in Appendix A attached hereto.) *At no time, however, did the trial court find that the condition constituted an unconstitutional taking of IMDC's property.* The Commission subsequently appealed the trial court's decision to the appropriate appellate

court (*Interstate Marina Development Co. v. State of California*, 2 Civ. 62356).

11. On October 23, 1980 the district court dismissed IMDC's claims for relief under the Fifth Amendment based on the denial of its application under the 1972 Act and the Commission's approval of its application subject to condition number one under the 1976 Act. (E.R. p. 294.) However, it left standing IMDC's claim for relief under the contract's clause (Art. I § 10) of the United States Constitution as well as an additional pendent claim.

12. On March 26, 1981 the district court determined that IMDC could not state a claim for relief under the contract clause and granted the Commission's motion for summary judgment. It also dismissed IMDC's pendent claim. (E.R. p. 748.)

13. On April 16, 1981, IMDC filed an appeal from the district court's decisions. (E.R. p. 753.)

14. In December 1981, pursuant to an amendment request it had submitted to the Commission, IMDC accepted an amended permit with conditions for the Marina Belle. (Appendix A to the Commission's Answering Brief.) The conditions to this permit require in part that IMDC provide funds for the construction of certain mitigation measures *offsite* in conjunction with the Marina Plaza project operated by its general partner.

15. On April 12, 1982, the state appellate court in *Interstate Marina Development Co. v. State of California*, 2 Civ. 62356 remanded *Interstate Marina Development Co. v. State of California*, Los Angeles Superior Court No. WEC 61422 back to the trial court with orders to vacate the judgment and dismiss the action as moot based on the Commission's issuance of the permit to IMDC for the Marina Belle. Petitioner herein expressly agreed in writing to accept

the court's order in this regard. (A copy of that order is attached hereto as Appendix B.) As a result, contrary to petitioner's suggestion, there is no state court judgment ruling that the Commission acted unlawfully with respect to IMDC's application and in fact there never was a judgment final or otherwise that the Commission had ever acted unconstitutionally.

16. In August 1983, the United States Court of Appeals for the Ninth Circuit filed its decision at issue herein.

17. Though it accepted a permit from the Commission in December, 1981, to this date, IMDC has not begun any construction whatsoever on the Marina Belle Hotel.

REASONS FOR DENYING THE WRIT.

A. The Decision Below Does Not Raise the Questions Presented in the Petition.

IMDC has asserted that three questions have been presented by its petition:

> 1. Does the fact that an unconstitutional taking is "temporary" insulate a state from a claim for relief brought under the Fourteenth Amendment?
>
> 2. If so, is the result changed if the property unconstitutionally taken is a leasehold interest of limited duration?
>
> 3. Are money damages an appropriate remedy where an unconstitutional taking his occurred in the course of governmental regulation of the use of land?

However, the Ninth Circuit did not decide any of these questions in this proceeding because it found that no unconstitutional taking had been alleged in petitioner's complaint.

Initially, with respect to the first two questions, nowhere in its opinion does that court suggest than an unconstitutional taking can be rendered constitutional simply because it is temporary in nature. To the contrary, the Ninth Circuit merely relied upon this Court's opinion in *Agins v. Tiburon*, 447 U.S. 255, 260-63, n. 9 (1980) to find that all delays in a landowner's ability to develop its property during the course of governmental decisionmaking do not *per se* constitute an unconstitutional taking of property.

In this regard, the Ninth Circuit merely stated that even assuming that IMDC had adequately alleged that the Commission's actions had deprived the lease of substantially all value during the time it took to obtain a permit with conditions it found acceptable, such a delay did not rise to the level of an unconstitutional taking absent an allegation that

the delay was extraordinary. Therefore since petitioner had not alleged extraordinary delay in its complaint, ". . . [t]he delay . . . did not constitute a 'taking' in the constitutional sense." (Opinion, at p. 5 of Appendix A to the Petition.)

In choosing to characterize the court's opinion as it has, IMDC has completely misread the opinion. Petitioner has turned a case which holds that a temporary delay in the ability to develop one's property is not unconstitutional into a case which supposedly finds that an unconstitutional taking can be made constitutional if it is only temporary. In reaching the conclusion it has with respect to the Ninth Circuit's opinion, petitioner has evidently failed to appreciate the distinction between unconstitutional takings and mere delays in governmental decisionmaking which do not become unconstitutional until they become extraordinary in nature. (*Agins v. Tiburon, supra,* 447 U.S. 255, at p. 263, n. 9.)

Insofar as the third issue is concerned, the Ninth Circuit expressly declined to rule at all on the question of the appropriateness of a damage remedy in this case because it had found that petitioner had no claim for an unconstitutional taking of property. (Opinion, at p. 6 of Appendix A to the Petition.) As a result that question as well cannot be extracted from the opinion below.

Therefore, inasmuch as none of the questions presented were decided by the court below, they could only be resolved by rendering an impermissible advisory opinion.

B. There Is No Conflict Between the Ninth Circuit's Opinion and the Sixth Circuit Case Cited by Petitioner.

Based on its misperception that the Ninth Circuit found that an unconstitutional taking had occurred and its misrepresentation that a final state court judgment exists which has declared the Commission's actions on IMDC's permit ap-

plication to be unconstitutional, petitioner has asserted that a conflict exists between the opinion herein and *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978) (p. 11 of the Petition).

In *Gordon v. City of Warren, supra*, the Michigan Supreme Court found that the defendant city's zoning ordinance at issue was an unconstitutional taking of the plaintiff's property. The Sixth Circuit ruled that the statute of limitations for bringing a claim for relief under the Fourteenth Amendment did not begin to run until such time as the state court constitutional decision became final.

Petitioner has argued that the Ninth Circuit's opinion conflicts with the *Gordon* decision because the Commission's conduct on IMDC's permit application was found unlawful by the state courts of California and yet the Ninth Circuit did not find that a claim for relief for an unconstitutional taking of property could be stated. (Petition pp. 10-11.)

As demonstrated in Appendix B to this brief, contrary to petitioner's gross distortion of the facts, there is no final state court judgment declaring any of the Commission's actions on IMDC's permit application unlawful. The only state court ruling against the Commission's decision was ordered vacated by the California Court of Appeal and the action upon which it was based has likewise been ordered dismissed. Moreover, the state trial court judgment which was rendered did not find that the Commission's actions on IMDC's permit application were unconstitutional. Rather in a decision which never became final, the trial court simply found that the Commission had acted in excess of its jurisdiction. (Appendix A to this brief.)

Consequently, in total contrast to the situation in *Gordon v. City of Warren, supra*, 579 F.2d 386, there was no final

final state court decision that the defendants herein had done anything unconstitutional with respect to petitioner's permit application. Indeed, there is no final state court judgment that the Commission did anything unlawful at all with respect to petitioner's application.

As discussed in subsection (A) above, the Ninth Circuit's opinion did not find that an unconstitutional taking had been alleged in petitioner's complaint. To the contrary, it found, in accord with *Agins v. Tiburon, supra*, 447 U.S. 255, that the most which had been alleged was a value depressing delay that did not reach unconstitutional dimensions. In reaching its conclusions in this regard, the Ninth Circuit did not ignore a final state court judgment declaring the Commission's action unconstitutional because no such judgment has ever existed.

For these reasons it must be found that no conflict exists between the Ninth Circuit's opinion in this case and the Sixth Circuit's opinion in *Gordon v. City of Warren, supra*, 579 F.2d 386.

C. There Is No Conflict Between the Ninth Circuit's Decision and Any State or Federal Court Decision on the Appropriateness of an Award of Damages for Government Regulation Constituting an Unconstitutional Taking of Property.

Petitioner has asserted that a raging conflict exists among various state and federal courts concerning the appropriateness of an award of damages for government regulation constituting an unconstitutional taking of property. However, petitioner has not demonstrated that any conflict exists between any of those opinions and the Ninth Circuit's decision in this case.

In its opinion, the Ninth Circuit said two things with respect to the damages question. First, that:

> "There may be circumstances in which a delay entitles a property owner to damages; but this is not one of them." (Petitioner's Appendix A, p. 5.)

Second, that it would not consider the Eleventh Amendment immunity claim of the State from damage actions because it had held that IMDC had no claim for relief upon which to seek damages from the State.

Under such circumstances, it is difficult to understand how this Ninth Circuit opinion can be said to be in conflict with the decisions of any other court on the damage issue. The opinion declines to make any ruling whatsoever on the damage question and its only comment in this regard suggests, in middle of the road fashion, that there "may be" circumstances in which a delay could be so long as to warrant an award of damages.

For these reasons it is apparent that petitioner has impermissibly sought to have this Court render an advisory opinion on the damages question. The goal is not to resolve a conflict between this opinion and others but rather to resolve an alleged conflict between decisions which are not before the court.[1]

---

[1]Petitioner's extreme desire to involve this Court in the controversy on the damages question despite the fact that it does not exist as an issue in this case is perhaps best demonstrated by the fact that petitioner's counsel were even willing to violate California Rule of Court 977 which provides that:

> "An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or a party in any other action or proceeding . . . (exceptions inapplicable here)."

Here at pages 16-17 of the Petition, counsel for IMDC have cited to this Court an unpublished opinion in direct contravention of this rule. For this reason respondents do not respond to the citation of the case except to note that the California Court of Appeal in that case found that no taking had occurred. As a result, the remedy decision in that case was, at best dicta.

D. No Effective Relief Can Be Awarded Petitioner Because the Eleventh Amendment Bars Damage Recoveries Against State Treasuries.

Even if petitioner's view were accepted and it were found appropriate to award interim damages to IMDC, such relief would be denied it because of the Eleventh Amendment.

As petitioner candidly conceded when it admitted to the Ninth Circuit that its challenge under 42 U.S.C. § 1983 was barred by the Eleventh Amendment under *Quern v. Jordan*, 440 U.S. 332 (1979) (Appellant's Opening Brief p. 25), petitioner's suit has been brought against the treasury of California. As such, despite the fact that individual defendants have been named, the suit for damages is barred.

Moreover, no different result is achieved through an action brought directly under the Fourteenth Amendment, because Congress has conspicuously failed to enact legislation authorizing suits for damages against State treasuries in order to permit vindication of Fourteenth Amendment rights. (See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).)

Finally, petitioner's suggestion that the State of California waived its Eleventh Amendment immunity through the enactment of section 30334 of the California Public Resources Code is patently false. That section, which reads as follows, simply provides that the Attorney General of California shall represent the Commission in any court in which it is sued; not that it consents to damage suits being brought against it in any court:

> "The commission may do the following:
>
> "(a) . . . .
>
> "(b) Sue and be sued. The Attorney General shall represent the commission and any regional commission in any litigation or proceeding before any court, board, or agency of the state or federal government."

Statutes similar to section 30334 have repeatedly been held not to constitute a waiver of Eleventh Amendment immunity. (See *Ford Motor Co. v. Department of Treasury* (1945) 323 U.S. 459, 465-466; *Riggle v. State of California* (1978) 577 F.2d 579; *Martin v. University of Louisville* (6th Cir. 1976) 541 F.2d 1171.)

For these reasons this petition should be denied because petitioners are not entitled to breach defendants' Eleventh Amendment immunity.

CONCLUSION.

By its petition IMDC has sought to have this Court decide questions not raised by the Ninth Circuit's opinion and to resolve conflicts which do not exist between this opinion and any other.

Relying upon state court decisions which it knows or should know do not exist, petitioner has attempted to force this Court to decide hypothetical questions.

In reaching its decision in this case, the Ninth Circuit followed this Court's opinion in *Agins v. Tiburon, supra,* 447 U.S. 255 and found that mere allegations of delay in the ability to develop property without more, do not constitute an unconstitutional taking of property but rather, if they are not extraordinary, are simple incidents of the ownership of property.

The patently unique facts of a case such as this, where a state is exercising interim permit authority for the benefit of local government jurisdictions engaged in the preparation of new general plans and zoning ordinances, is not one which is likely to be repeated in other states.

It is also clear that the presence of the Eleventh Amendment issue in this case would prevent this Court from providing any effective relief to petitioner even if it were to

rule in petitioner's favor on the taking and damage questions.

As a consequence, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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By PETER H. KAUFMAN,
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APPENDIX A.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California for the Court of Los Angeles.

Interstate Marina Development Co., a limited partnership, Plaintiff, vs. The State of California, et al., Defendants. Case No. WEC 061422.

Plaintiff's application and petition for a writ of administrative mandamus under C.C.P. § 1094.5 came regularly on for hearing on April 11, 1980, before the Honorable Laurence J. Rittenband, Judge Presiding in Department D of the above-entitled Court. Plaintiff was represented by Alan R. Jampol, Esq. of Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch, Defendants (other than the County of Los Angeles) by Peter H. Kaufman, Esq., Deputy Attorney General, and Intervenors by Hillel Chodos, Esq. The Court, having read and considered the administrative record represented to the Court in this matter and no other evidence (the Court having specifically disregarded any declarations by the intervenors), and the briefs and legal memoranda filed by the parties, and being duly advised in the premises, and having determined that Plaintiff is entitled to judgment for a writ of mandamus as prayed, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff Interstate Marina Development Co., a limited partnership ("IMDC"), is the holder of the beneficial interest in the leasehold for the property known as parcel 141T in Marina del Rey, County of Los Angeles, State of California, hereinafter referred to as "the subject property."

2. IMDC acquired its leasehold interest in 1971, and since that time, has prepared designs, specifications and plans to construct and operate a nine-story hotel upon the subject property, to be known as "the Marina Belle Hotel."

3. Prior to December, 1975, IMDC had obtained all requisite approvals from the County of Los Angeles and other governmental agencies for the construction of the Marina Belle Hotel as designed by IMDC, save only the approval of the California Coastal Zone Conservation Commission, now known as the California Coastal Commission (hereinafter referred to as "the State Commission") and a building permit from the County of Los Angeles, which could not be issued until after approval by the State Commission.

4. In December, 1975, IMDC presented to the South Coast Regional Commission its application for coastal development permit under California Coastal Zone Conservation Act of 1972, Public Resources Code § 27000 *et seq.* and regulations promulgated thereunder.

5. The original application to the South Coast Regional Commission was denied by that Commission, and, upon appeal to the State Commission, the State Commission found that no substantial issue existed and therefore refused to hear the appeal. Such refusal on the part of the State Commission to hear the appeal, for the purposes of the California Coastal Zone Conservation Act, made the decision of the South Coast Regional Commission final.

6. On December 15, 1978, pursuant to an order of the United States District Court, the original application of IMDC for a coastal development permit was returned to the South Coast Regional Commission for a hearing de novo under the provisions of the California Coastal Act of 1976, Public Resources Code § 30000 *et seq.*, which had superseded

and replaced the California Coastal Zone Conservation Act of 1972.

7. On January 29, 1979, the South Coast Regional Commission approved without conditions the application of IMDC for a coastal development permit.

8. Upon appeal of the decision of the South Coast Regional Commission to the State Commission, the State Commission found that a substantial issue existed with respect to such appeal, and set the appeal for public hearing on August 15, 1979.

9. At the hearing of August 15, 1979, the State Commission consolidated the appeal with respect to IMDC's application with the appeal from a separate decision of the South Coast Regional Commission approving, with some conditions, the application by Marina Plaza, a limited partnership, for a permit to construct a hotel on a separate piece of property, to be known as the "Marina Plaza Hotel."

10. Although Real Property Development Corp. (one of the intervenors herein) is the general partner of the Marina Plaza limited partnership, which is the owner of the leasehold interest for the parcel upon which the Marina Plaza Hotel was to be developed, and is also the general partner of IMDC, the two entities are for all purposes, separate and independent entities with no legal connection.

11. Despite the fact that both Marina Plaza and IMDC share the same general partner, as a legal and practical matter, IMDC has no control over the actions of Marina Plaza, and cannot induce or compel Marina Plaza to act or decline to act in any manner, or at all.

12. At the August 15, 1979, hearing before the State Commission, both Marina Plaza and IMDC objected to the consolidation of the appeals on their respective projects for hearing before the State Commission, and specifically

requested that each application be heard and determined separately.

13. Despite the aforesaid objection and request by Marina Plaza and by IMDC, the State Commission did in fact consolidate the hearings, although separate votes were taken. In addition, the State Commission staff produced a combined and consolidated staff report and recommendation upon which the State Commission relied at the hearing.

14. As a result of the consolidated hearing by the State Commission of the applications of IMDC and Marina Plaza, the State Commission approved the application of IMDC for a coastal development permit with several conditions. Among these conditions was a requirement that a "construction bond" for the Marina Plaza project be obtained by Marina Plaza and delivered to the State Commission before the Marina Belle Hotel could commence construction (condition No. 1 to the IMDC permit).

15. The Marina Plaza project was approved, but with a number of conditions which severly impacted upon the viability of that project. Among the conditions were price restrictions (ultimately quantified by the State Commission on December 19, 1979 in an amendment to the Marina Plaza permit) and a requirement that no permit would be final until the Executive Director of the State Commission had approved the final working drawings and plans for the project.

16. Separate conditions to the IMDC permit required IMDC to institute a program of rate reductions on the 15% of the Hotel's rooms on weekends for low and moderate income persons, and to provide certain boating facilities to the public. None of the conditions to the IMDC permit affected the design, structure, appearance or location of the

Marina Belle Hotel, or had any impact upon traffic, the environment or physical access to the Marina.

17. There is no reasonable, rational or cogent reason for requiring a construction bond on the separate and distinct Marina Plaza project before the construction of the Marina Belle Hotel, nor is there any basis in the administrative record for such a condition.

18. The condition to the IMDC permit requiring IMDC to provide reduced room rates for low and moderate income persons satisfies in a reasonable manner the provisions of the California Coastal Act of 1976 relating to low income housing and access to the coastal zone, specifically Public Resources Code §§ 30210, 30212, 30213, 30221, 30222 and 30223.

19. The condition to the IMDC permit requiring IMDC to provide certain boating facilities upon condition 3 satisfies, in a reasonable manner, the requirements of §§ 30220 and 30224 of the Public Resources Code.

20. As a result of the assertion by IMDC at the State Commission hearing of August 15, 1979, that its application and that of Marina Plaza must be considered separately and apart, and that each applicant was entitled to an independent hearing on its application, and as a result of the determination made specifically by the Deputy Attorney General representing the Commission at that hearing that the Commission had the power and authority to impose condition No. 1 to the IMDC permit, IMDC has exhausted its available administrative remedies, and no further administrative remedies remain for it to pursue. In addition, the Court specifically finds that the State Commission was aware of all relevant times that there was some question or dispute as to the power of the Commission to impose condition No. 1 to the IMDC permit, and the State Commission specifi-

cally determined at the hearing of August 15, 1979, that it had such power, and there was nothing further that IMDC could have done with respect to that dispute to enable the State Commission to make further findings with respect to that matter or to give it further consideration.

21. To the extent that any finding of fact herein should be more properly deemed a conclusion of law, the same shall in fact be deemed and considered to be a conclusion of law.

CONCLUSIONS OF LAW

1. In requiring condition number one to the IMDC permit, requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, the State Commission acted arbitrarily, capriciously and in excess of the jurisdiction conferred upon it by law or regulation.

2. The condition (No. 1) to the IMDC permit, requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, has no rational relationship, or any relationship at all, to the policies or provisions of the California Coastal Act of 1976.

3. The condition (No. 1) to the IMDC permit requiring the provision of a construction bond for the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel is not supported by substantial evidence in the administrative record.

4. The condition (No. 1) to the IMDC permit requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel is totally outside the scope of and unrelated to any aspect of the California Coastal Act of 1976, and could not be and was not reasonably relied upon by the

State Commission in determining whether or not the IMDC project met the requirements of the California Coastal Act of 1976.

5. The Commission determined that the IMDC project met the policies and requirements of the California Coastal Act of 1976. As such determination could not reasonably have been based upon the condition (No. 1) requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, the IMDC project is and at all times herein mentioned was in conformity with all such policies and requirements.

6. In light of the foregoing, this Court is not required to, and, under the circumstances should not remand the application to the State Commission for rehearing, but is entitled to and should strike from the permit, the condition (No. 1) requiring the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, and issue its writ of mandamus to the State Commission requiring the State Commission to issue to IMDC its permit as approved on August 15, 1979, without the said condition.

7. In light of the foregoing conclusions and findings, the Court finds it unnecessary and inappropriate to consider the claim of IMDC that the Commission is barred by the doctrines of res judicata and/or collateral estoppel from hearing an appeal from the January 29, 1979 decision of the South Coast Regional Commission granting IMDC an unconditional permit. The Court, therefore, makes no findings or determination as to that issue; if the judgment herein is reversed, said shall remain for determination by this Court.

8. Pursuant to the stipulation of the parties, Respondents shall be deemed to have answered the Petition for

Writ of Mandate by denying all material allegations thereof and asserting as an affirmative defense the claim that IMDC did not exhaust its administrative remedies prior to bringing this action.

9. To the extent that any conclusion of law herein should more properly be deemed a finding of fact, said conclusion of law shall be deemed and considered to be a finding of fact.

10. Let judgment be entered herein and a peremptory writ of mandamus issue out of this Court directed to the California Coastal Commission requiring said California Coastal Commission to delete from its permit issued or to be issued to IMDC the requirement for the provision of a construction bond on the Marina Plaza project prior to the commencement of construction of the Marina Belle Hotel, and ordering the California Coastal Commission to issue to IMDC its permit as approved on August 15, 1979, excluding such condition, and to file a return with this Court indicating that it has in fact done so. Plaintiff shall also have judgment for its costs of suit herein incurred.

Dated: July 9, 1980.

/s/ [Illegible]
JUDGE OF THE SUPERIOR COURT

APPENDIX B.

Order Remanding Case With Directions to Vacate Judgment and Dismiss Action.

In the Court of Appeal of the State of California, Second Appellate District.

Interstate Marina Development Co., a limited partnership, Plaintiff and Respondent, v. The State of California, et al., Defendants and Appellants. 2 CIV. 62356.

Filed: April . . ., ...

Upon the motion of appellant California Coastal Commission to remand this case with directions to vacate the judgment and dismiss the action (which respondent has by writing expressly not opposed) and good cause appearing therefor,

IT IS HEREBY ORDERED that this action be remanded to the trial court where said court is to vacate its judgment and dismiss the entire action as against all defendants, other than the County of Los Angeles, as moot.

IT IS FURTHER ORDERED that each side shall bear its own costs and that the remittitur issue forthwith.

DATED: April 12, 1982.

/s/ Stephens
PRESIDING JUSTICE

Approved as to form and content:
FOONBERG, JAMPOL & GARDNER
/s/ Alan R. Jampol
ALAN R. JAMPOL
Attorneys for Plaintiff and
Respondent

Office-Supreme Court, U.S.
FILED
MAR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1174

IN THE

Supreme Court of the United States

October Term 1982

INTERSTATE MARINA DEVELOPMENT CO., a limited partnership,

Petitioner,

vs.

DORILL B. WRIGHT, *et al.*,

Respondents.

REPLY BRIEF (IN SUPPORT OF PETITION FOR CERTIORARI).

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REPLY BRIEF (IN SUPPORT OF PETITION FOR CERTIORARI).

Introduction.

The Court below held that the devastation visited on Petitioner was not a taking because it was temporary (Petition for Certiorari, Appendix A, pp. 4-5); thereby it begged the issue of a *temporary* taking and created express conflict with *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

Instead of confronting the conflict issue, Respondents seek to evade it by mischaracterizing Petitioner's position below, and by embracing arguments that simply defy hornbook federal law.

ARGUMENT.

1.

Respondent's Imputation to Petitioner of a "Concession" That Its Claim Under 42 U.S.C. §1983 Is Barred, Is Untrue and Seeks to Evade This Court's Directly On-Point Holding in *Lake County Estates*.

One is startled to read (at pp. 1-2 and 14 of the Brief in Opposition; hereafter Br. Opp.) that Petitioner "admitted" and "conceded" that 42 U.S.C. §1983 relief is barred. Petitioner's brief below speaks for itself:

> ". . . IMDC is asserting a claim directly under the Fifth and Fourteenth Amendments under the doctrine laid down in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 .... (1971), *in addition to the Civil Right Act (42 U.S.C. §1983 — see e.g. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra*, in which the taking claim was premised on the Civil Rights Act.)"
>
> Appellant's Opening Brief, p. 16, emphasis added.[1]

No such admission or concession has been made. On the contrary, Petitioner has always sought, and is still seeking, relief under 42 U.S.C. §1983.

Besides, this Court made it clear in *Lake Country Estates, supra*, 440 U.S. 391, that 42 U.S.C. §1983 does indeed provide a proper basis for seeking relief against non-legislative state officials (the Eleventh Amendment notwithstanding), specifically in the taking-by-regulation context. The fact that a defendant is a state official does not afford him immunity from liability under §1983 for his

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[1]Page 25 [et seq.] of Appellant's Opening Brief below, alluded to — but not quoted — at Br. Opp. 2, addressed the *Bivens* theory of direct constutional liability. By no stretch of the imagination did it comprise a waiver of the §1983 theory which — as shown *supra* — was asserted by Petitioner in addition thereto.

unconstitutional acts; see *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Finally, it seems quite apparent that what Respondents are about by bringing up this red herring is to divert the Court's attention from the settled rule that even under Respondent's view of the Eleventh Amendment (which is not in issue here),[2] individual officials can be liable. Hence, the individual respondents have evidently conjured up here a fanciful "concession" which could conveniently let them evade accountability to the Constitution. Here, unlike in *Ford Motor* relied on by Respondents, Petitioner seeks relief not only against the Commission but also against the individual Respondents who now recognize as they must that their actions were — and were adjudged to be — unlawful (Br. Opp. 11). In short, even giving Respondents' argument a favorable reading, it is hornbook law that *an individual* acting under color of state law is responsible for his *individual* misdeeds. The fact that he may be a [non-legislative] state official does not grant him immunity, but, on the contrary, establishes that the wrongful act constitutes state action. As this Court aptly and explicitly explained in *Screws v. United States*, 325 U.S. 91, 107-108 (1945), the fact that one's actions are *unlawful* under state law does not

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[2]Since, however, Respondents persist in arguing this non-issue (Br. Opp. 14-15) suffice it to note that in *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 465-466 (1945) on which Respondents rely, the statute in question authorized suits against the State in ". . . circuit or superior court of the county in which the taxpayer resides or is located . . ." (Id. at 465). At bench, the pertinent statute (Cal. Public Resources Code §30334; quoted at Br. Opp. 14) expressly provides that the Commission may be sued ". . . in any litigation or proceedings *before any court . . . of the . . . federal government . . .*," emphasis added. How much more explicit can legislative leave to sue in federal courts be?

Moreover, *Ford Motor* itself was explicit that individual officials *are* liable for their acts (323 U.S. at 462), and are not shielded by the Eleventh Amendment.

create immunity to federal law. "The defense is not pretty. Nor is it valid" *Ibid.* at 114, Rutledge J. concurring.

2.

Respondents' Argument That Since Their Conduct Was Unlawful Under State Law, That Makes Them Immune to Federal Laws, Defies a Century of Federal Law.

Respondents' reply to the fact that their conduct was adjudged unlawful by state courts, is both a quibble and an absurdity.

Their quibble is that the judgment against them was not "final" (Br. Opp. 11), and the absurdity is that the federal courts cannot afford relief because Respondents' conduct was not found unconstitutional by the state courts (*Id.*).[3] Neither branch of this argument has any merit.

The quibble, far from aiding Respondents, is precisely the sort of harrassment accomplished by shifting the wrongdoer's position, that was rightly denounced by Mr. Justice Brennan in *San Diego Gas & Electric*, 450 U.S. 621, 655-656, fn. 22 (1981).[4] As Appendix A to Br. Opp. (at p. 5) makes clear, the state court determined that Respondents had ". . . no reasonable, rational or cogent reason . . ." for crippling Petitioner's project with unreasonable bonding conditions, and that Respondent Commission was ". . . acting arbitrarily, capriciously and in excess of jurisdiction conferred upon it by law or regulation" (*Id.* at p. 6). When (instead of obtaining an appellate adjudication thereof)

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[3]It is on that latter basis that Respondents ingeniously seek to distinguish *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[4]Please note that since the instant Petition was prepared, the Seventh Circuit has again explicitly taken the position that on the issue of taking and remedies, Mr. Justice Brennan's opinion in *San Diego* reflects the view of this Court's majority. See *Barbian v. Panagis*, 694 F.2d 476, 482, fn. 5 (7th Cir. 1982).

Respondents acceded to the state trial court's judgment and rescinded the unlawful conditions, they did not thereby vindicate their actions; quite the contrary: they merely obeyed a court decision *against them*. Besides, one would think it basic that Respondents' arbitrariness, capriciousness, lack of jurisdiction and lack of any reasonable, rational or cogent reason for their actions, are the very essence of denial of due process!

The absurdity inherent in Respondents' argument lies in the fact that it would make federal liability (under 42 U.S.C. §1983 *inter alia*) dependent on a prior *state* court determination of unconstitutionality, before the federal judicial power could be invoked. The fact that state law may provide a non-constitutional remedy in no way precludes a plaintiff from suing under §1983; that very argument was made in *Monroe v. Pape*, 365 U.S. 167, 172 (1961), only to be squarely rejected: "It is no answer that the State has a law which if enforced would give relief. *The federal remedy is supplementary to the state remedy*, . . ." (*Id.* at 183, emphasis added).

And so it is here. The fact that the state court afforded non-monetary relief on the basis of state law (the only relief it could grant) in no way affected Petitioner's *federal* right under *Gordon v. City of Warren* to an action at law under §1983. Also see *Sixth Camden Corp. v. Township of Evesham*, 420 F.Supp. 707 (D.N.J. 1976). With all due respect, to suppose that the United States Court of Appeals in *Gordon* could not have acted to grant relief were it not for the Michigan Supreme Court first issuing it a license to do so, as it were, by making an antecedent finding of unconstitutionality, is simply absurd; it stands the very concept of federal supremacy on its head.

3.

Respondent's "Explanation" That There Is Nothing "Extraordinary" About Unlawfully Denying a Land Owner All Use of Land for Over a Half-Dozen Years, Merely Bespeaks the Appalling Conditions in California and the Urgent Need for Intervention by This Court.

There is little that can be added to the above heading. World War II lasted only 3½ years; yet this Court repeatedly ruled in both direct and inverse condemnation cases that just compensation had to be paid for the duration of temporary takings. See *e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Indeed, as *General Motors* and *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948) show, the measure of damages in a temporary taking may be greater, because the harm may be greater.

And yet in the case at bench, Respondents blandly assert that there is nothing "extraordinary" in *de facto* deprivation of *all* use and benefit of private property for a period *twice as long as World War II*. Indeed, in *San Diego Gas & Electric Co.*, Mr. Justice Brennan stressed the remedial need where — coincidentally — a seven-year regulatory taking had occurred. (450 U.S. at 655, fn. 22).

In short, the fact that a seven-year deprivation of all use of property, and a *pro tanto* full and irretrievable confiscation of a significant portion of Petitioner's leasehold can be blandly characterized by Respondents as not at all "extraordinary", makes clear, perhaps better than Petitioner can, just how far things have deteriorated in California.

If a seven-year taking is the "ordinary" norm, then just how egregious must things get to invoke judicial relief?

Conclusion.

Petitioner has been totally deprived of its property for seven years, and — to add insult to injury — was made to pay rent and taxes to the government which deprived it of all benefit of the subject property. Because Petitioner is a lessee those years have been irretrievably confiscated. There has been a temporary taking here, which — as Mr. Justice Brennan put it — is no less a taking merely because it is temporary (450 U.S. at 657). Relief by this Court is both warranted and urgently needed in light of the disarray in the law briefed by Petitioner and not disputed by Respondents.

Petitioner prays that the writ of certiorari issue.

Respectfully submitted,

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